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Review article

Territorial jurisprudence, *ikhtilaf al-darayn*: Political boundaries & legal jurisdiction

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ABSTRACT

Background:

Ikhtilaf al-darayn (territoriality) is a unique Hanafi legal concept that signifies the Hanafi recognition of the constraints of enforcing a legal system when it comes to geopolitical realities. This paper argues that the Hanafi legal application of the theory of territoriality in their primary legal literature allowed them to go beyond defining individuals based on their religious identities to mainly focus on the legal status of individuals within or outside Muslim jurisdiction. Unlike the majority of Islamic legal schools, Hanafis consistently upheld the theory of territoriality and stressed that the universal features of the law do not have any legal imperative outside the political framework of Muslim jurisdiction. Hence, they acknowledged the constraints of the legal and political powers of the *Imam* outside the Muslim jurisdiction.

Methodology:

The primary Hanafi legal texts were relied upon to explore the theoretical foundation of the concept of territoriality (*ikhtilaf al-darayn*). In my analysis, I have traced usage and application of this concept across different legal topics and in different historical moments. The aim was to show the consistent usage of this doctrine in the Hanafi school. I have benefited from the Hanafi debates with other legal schools regarding the realm and applicability of the concept of territoriality. Finally, the case studies that I have explored demonstrated that Hanafis differentiate between the legal status of a *dhimmi* and a *musta'man* residing in *dar al-Islam*, despite the fact that these individuals are non-Muslims and adopt the same religion.

Results:

The significant results of this concept can be summarized in two points. First, it reveals a diverse tradition of legal theories that have framed the extra territorial relations of *dar al-Islam*. Second, for Hanafis, religion was never a factor in their legal determinations in deciding the inviolability (*'isma*) of individuals' life or property within *dar al-Islam*.

Conclusion:

Ikhtilaf al-darayn is a legal doctrine particular to the Hanafi school. Hanafis place a significant weight on the role of the Muslim ruler in executing the law. Therefore, they acknowledge the constraints of the legal and political powers of the Muslim ruler outside the Muslim jurisdiction. Consequently, the legal imperative of these legal concepts have been exclusively framed within the political jurisdiction of *dar al-Islam*. Thus, Hanafis conceded to the fact that the addressees of the ethical or moral values of Islamic legal system are exclusively Muslims and those who reside permanently in *dar al-Islam*, namely *dhimmis*. Hanafis maintained that the universalist features of the law do not have any legal imperative outside the political structure of the Muslim jurisdiction.

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INTRODUCTION

Political boundaries and legal jurisdiction have been two central factors in the development of the concept of *'dar'* in the classical legal literature. This concept was defined by jurists to structure a legal framework for international relations between Muslim political order and the rest of the world. This paper defines *'dar'* as a territory or jurisdiction in which a political structure and an enforceable legal system are indispensable to the very existence and functioning of this entity. We observe that most classical legal schools, Hanafi, Shafi'i, Maliki and Hanbali, perceive the world as a dichotomy of *dar al-Islam* v. *dar al-harb*. Nevertheless, these legal schools crafted other legal labels such as *dar al-sulh* or *dar al-'ahd* (abode of treaty) to respond to the continuous change of geopolitical circumstances of their time. These legal labels are not doctrinal concepts. In the *Qur'an*, the word *'dar'* appears mainly in its linguistic meaning i.e. place of residence, final abode, or simply a house.[1] The *Qur'an* did not inspire any of the legal implications crafted by the jurists. Fundamentally, jurists rarely used the *Qur'an* to justify their legal determinations on this specific subject. Jurists took their cue primarily from prophetic traditions (*hadith*) and certain historical events during the Prophet's lifetime, especially the event of migration (*hijra*) to Medina.

This paper makes two main arguments. First, it maintains that the Hanafi legal school was consistent in their position and application of the theory of territoriality (*ikhtilaf al-darayn*) in their early and late primary legal literature.[2] Hanafis used various terms to refer to the concept of *ikhtilaf al-darayn* such as *tabayun al-darayn* (two distinct jurisdictions), *in'idam al-wilaya* (absence of political and legal dominion), *la yad li'l-Imam fil-dar* (no political or legal power for the Muslim ruler within a certain jurisdiction). Secondly, Hanafis placed a significant weight on the role of the political leader (*Imam*) in executing the law. Therefore, they acknowledged the constraints of the legal and political powers of the Muslim political leader outside the Islamic jurisdiction. Furthermore, Hanafis did not regard the concept of *ikhtilaf al-darayn* to be contradictory with the theological claim of Islam as being a universal religion. Strictly speaking, Hanafi jurists framed the concept of *ikhtilaf al-darayan* through the legal and political influence of the Muslim ruler to execute his powers within certain geographical boundaries. In other words, for Hanafis, the focal point in the concept of *ikhtilaf al-darayn* is the legal status of the Muslim or non-Muslim subjects within the Muslim jurisdiction (*dar al-Islam*) or abode of war (*dar al-harb*). Hanafis view this concept in the context of a secured political jurisdiction in which the Muslim ruler is able to exercise his mandate of power. Importantly, the individuals' religious identities were not a major factor in this structure. Yet, some discrepancies in the application of the theory of *ikhtilaf al-darayn* have been observed when Hanafi jurists applied their juristic preference (*istihsan*) to address some of the intricate cases. In this regard, the legal determinations on prescribed punishments (*hudud*) and retaliation (*qisas*) are perfect examples.

The significance of the concept of *ikhtilaf al-darayn* can be summarized in three points. Firstly, it reveals a diverse tradition of legal theories that have framed the extra territorial relations of *dar al-Islam*, necessitating a more nuanced understanding of the internal dynamics of the dichotomy of *dar al-harb* v. *dar al-Islam* in the legal literature. Secondly, it ascertains that classical legal classifications of political jurisdictions are historically contingent and parochial; thus, they cannot be utilized to legally evaluate contemporary political entities; namely, nation states in the current intricate setting of international relations. Thirdly, according to Hanafis, the concept reveals that religion was not a factor in deciding the inviolability (*'isma*)[3] of individuals' life or property within *dar al-Islam*.

This paper will first clarify the concepts of *dar al-Islam* and *dar al-harb* in the classical Hanafi legal literature. Then, it will thoroughly investigate the unique Hanafi concept of *ikhtilaf al-darayn*. It will do so by analyzing Hanafi legal determinations on marriage, prescribed punishments (*hudud*) and retaliation (*qisas*). In the context of the cases discussed, *'dar'* is considered a legal concept through which jurists framed the relationship of its residents or visitors in relation to other neighboring jurisdictions.

In his article "Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries", Khaled Abou El Fadl analyzed the juristic

[1] Qur'an 2:49;6:32;6:127;10:25;13:24.

[2] Al-Shaybani, *al-Siyar al-Kabir*, vol. 5.1853. Al-Kasani, *Bada'i' al-Sana'i'*, vol. 7. 237. Al-Sarakhsi, *al-Mabsut*, vol. 26. 123. Al-Musili Al-Hanafi, *al-Ikhtiyar li T'alil al-Mukhtar*, vol. 4. 136.

[3] The term *'isma* here refers to the duty of protecting people's life and money by the ruling power within a certain jurisdiction.

discourse on Muslim minorities living in non-Muslim lands. In this regard, he mainly focused on two main issues: the migration (*hijra*) from *dar al-harb*, and the legality of residing in non-Muslim land. Abou El Fadl argued that a fully developed legal theory was articulated only after the sixth/twelfth century in the aftermath of the Christian invasions in the West and the Mongol invasions in the East. As a result, he maintained that the positions of the different schools should be viewed as historical responses to historical challenges.[4] Abou El Fadl stressed that Hanafis are preoccupied with territorial and jurisdictional intricacies and prepared to disengage moral obligations from legal consequences.[5] Furthermore, he argued that Muslim jurists dutifully affirm that all Muslims belong to a single community (*umma wahida*) regardless of their residence.[6] Then, he claimed that even the Hanafi school, which emphasizes the notion of territoriality, methodically insists that wherever Muslims reside they belong to *dar al-Islam*.[7] In Islamic jurisprudence, Abou El Fadl asserted that law and ethics do not always correlate and therefore the divergence between the moral imperative and the legal rule points to the tensions that permeate a legal system that emanates from a universal theology.[8] Moreover, Abou El Fadl asserted that the dichotomous language in the legal literature was practically challenged by the persistent existence of Muslims outside *dar al-Islam*.[9]

Although Abou El Fadl touched upon the concept of territoriality (*ikhtilaf al-dar*), he did not thoroughly investigate its internal dynamics within the Hanafi legal literature. This paper questions his assertion that systematic juristic positions on legality of residence in non-Muslim territory were developed only after the sixth/twelfth century as a response to historical challenges. In fact, some fully developed legal concepts such as *ikhtilaf al-darayn* show internal consistency and persistent usage in the early and late Hanafi legal literature: from the *Siyar* of Muhammad b. al-Hasan al-Shaybani (d. 189/805) till the *Hashiya* of the late Hanafi jurist Ibn 'Abidin (d. 1252/1836).

Hanafis developed a multilayered structure of the concept of *ikhtilaf al-darayn*. The assumption thought to be maintained by Hanafis, that Muslims regardless of where they reside, belong to *dar al-Islam* is simply inaccurate. For Hanafis, there are other factors which determine the legal dynamics of *ikhtilaf al-darayn* such as residency and legal status of individuals. In theory, the individuals' religious affiliation was never a factor in the Hanafi legal structure of the concept of *dar*. In this regard, Abou El Fadl's reference that Hanafis state that Muslims belong to *dar al-Islam* wherever they reside does not reflect the context of the quotation he used to support his point. In fact, he quotes a statement from Shams al-A'imma al-Sarakhsi in which he was discussing one type of territoriality, namely *al-ikhtilaf al-haqiqi*.[10] Hanafis were consistent in recognizing the limitations of the legal and political jurisdictions of *dar al-Islam*. Therefore, they developed a legal structure to manage the legal consequences of individuals from other jurisdictions visiting *dar al-Islam*. At the same time, they sought to facilitate the affairs of Muslims entering *dar al-harb* for trade or other reasons. The concept of *ikhtilaf al-darayn* signifies the Hanafi recognition of the constraints of a legal system when it comes to political realities. They clearly framed legal practice within the political structure of the Muslim political order. Importantly, Hanafis did not refer to these issues in terms of their moral or ethical value. Hanafis conceded to the fact that the addressees of the ethical or moral values of an Islamic legal system are exclusively Muslims and those who reside permanently in *dar al-Islam*, namely *dhimmis*, Hanafis maintained that the universalist features of the law do not have any legal imperative outside the political structure of the Muslim jurisdiction.

Additionally, in their article "Dar al-Islam: The Evolution of Muslim Territoriality and Its Implications for Conflict Resolution in the Middle East", Manoucher Parvin and Maurie Sommer claimed that *dar*

[4] Khaled Abou El Fadl, "Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries", *Islamic Law and Society*, 1:2 (1994): 182.

[5] Ibid., 177.

[6] Ibid., 165.

[7] Ibid., 165.

[8] Ibid., 171.

[9] Ibid., 141.

[10] Al-Sarakhsi, *al-Mabsut*, vol. 10. 61. This type of territoriality deals with the permanent residency of individuals. The story specifically addresses a case in which a married Muslim slave girl who had been captured (*ma'sura*) by individuals from *dar al-harb* was moved to *ikhtilaf haqiqi*. In this case, Hanafis consider her marriage to be valid despite her physical presence in a different jurisdiction (*ikhtilaf haqiqi*). This physical proximity did not invalidate the marriage contract per se. The change of ownership of this slave girl to *ahl al-harb* did not invalidate her marriage because for Hanafis, the possession of a slave girl whether by force or sale is not a factor in deciding the validity of her marriage contact. The slave girl was considered to belong to *dar al-Islam* in her legal status (*hukman*) even though she was present physically in a different jurisdiction.

al-Islam provides a pivotal handle with which to approach intraregional conflicts. They assumed that the concept of *dar al-Islam* emerged from pre-Islamic roots, nomadism and urbanism.[11] Moreover, it appears that they perceived this concept as a doctrinal principle rather than a historical legal concept developed by jurists to respond to certain circumstances. Therefore, the use of the concept of *dar al-Islam* to solve the Arab-Israeli conflict is likely unproductive. As is obvious from their endnotes, they did not consult any primary *fiqh* books. Therefore, their arguments do not address the core legal, political, or historical underpinnings of this concept.

Dar al-Islam & *dar al-harb*

In their definition of *dar al-Islam* and *dar al-harb*, Hanafis maintained a clear and unique legal reasoning. Al-Kasani ('Ala' al-Din Abu Bakr b. Mas'ud b. Ahmad al-Kasani, d. 1191) introduced a systematic discussion concerning the concepts of *dar al-harb* and *dar al-Islam*.[12] He demonstrated that Hanafis do not differ in that *dar al-kufr* is transformed into *dar al-Islam* with the predominance of Muslim laws (*zuhur ahkam al-Islam*). Al-Kasani's discussion of *dar al-harb* and *dar al-Islam* reveals the intrinsic features of these concepts. He narrates from Ya'qub b. Ibrahim al-Ansari known as Abu Yusuf (d. 798) and Muhammad b. al-Hasan al-Shaybani (d. 805) that *dar al-Islam* and *dar al-kufr* are mainly defined in terms of the enforcement of the land's laws (*zuhur al-ahkam*) in these two jurisdictions. In other words, the concept of *dar al-Islam* is applied to a territory in which the laws of Islam are enforced. By the same token, *dar al-kufr* applies to a territory which is governed by non-Muslim laws.[13]

Furthermore, Abu Hanifa (Nu'man b. Thabit b. Zuta b. Marzuban, d. 150/ 767), the eponym of the Hanafi school, is credited with a unique perspective on the intrinsic nature of *dar al-harb* and *dar al-kufr*. He stressed that identifying *dar* with 'Islam' or ' *kufr*' does not refer to the conceptual realities (*'ayn*) of these terms. Rather, it refers to more focal elements such as security and fear of the residents within these jurisdictions. As a result, Abu Hanifa emphasized that security is the main factor in declaring a place as *dar al-harb* or *dar al-Islam*.[14] But he contradicted himself when he declared that *dar al-Islam* as always providing security for Muslims and fear for the non-Muslims (*kuffar*).[15] In the same vein, he perceived *dar al-harb* as a territory where security (*aman*) is always for *kuffar* and the fear is always for Muslims. The key point however in Abu Hanifa's opinion is his incorporation of the elements of security and fear as the main components in his legal framework.[16] According to al-Kasani, Hanafis disputed the conditions that render *dar al-Islam* to be legally considered *dar kufr*. Abu Hanifa listed three conditions for this transformation: first, the domination of non-Muslim laws (*zuhur ahkam al-kufr*); second, this jurisdiction should be within an immediate regional proximity of *dar al-kufr*; third, a Muslim or *dhimmi* (protected non-Muslim) cannot be secure in this jurisdiction.[17] Noticeably, Abu Hanifa integrated the regional element and the security factor as core concepts in defining *dar al-Islam* or *dar al-kufr*. Yet, according to his disciples, Muhammad and Abu Yusuf, *dar al-Islam* is considered *dar kufr* with the mere application of non- Muslim laws (*ahkamdaral- kufr*).[18]

As a result, *dar al-harb* is a legal concept designated to territories that are not under the political sovereignty of *dar al-Islam* or jurisdictions that do not hold any treaties with *dar al-Islam*. Most importantly, it is essential to contextualize this concept in a period where the frontiers of Muslim lands expanding significantly. Most Hanafi jurists maintain that the main feature of *dar al-harb* is *zuhur ahkam al-kufr*, even if the majority of the population are Muslim.[19] Also, some have argued that *dar al-harb* is the territory where people are residing without a pact (*'ahd*) that defines their relation to *dar al-Islam*. Therefore, entities that are outside the jurisdiction of *dar al-Islam* and do hold treaties with it are considered *dar harb*.[20]

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[11] Manoucher, Parvin and Maurie Sommer. "Dar al-Islam: The Evolution of Muslim Territoriality and Its Implications for Conflict Resolution in the Middle East", International Journal of Middle East Studies, vol. 11, No. 1. (Feb., 1980):1-21.

[12] Al-Kasani, 'Ala' al-Din. *Bada'i' al-Sana'i'*, vol. 7. 130.

[13] Ibid., 131.

[14] Ibid.

[15] Ibid.

[16] Ibid., 130-31.

[17] Ibid.

[18] Ibid., 130.

[19] Al-Sarakhsi, *al-Mabsut*, vol. 10. 114.

[20] Qasim, Muhammad Muhy al-Din, *al-Taqsim al-Islami li'l-Ma'murah*, 81.

Therefore, for Hanifis, the political control and dominance of non-Muslims over a territory does not necessarily transform it into *dar harb*. Abu Hanifa stressed that a territory cannot be considered as *dar al-harb* except for the three previously mentioned conditions.[21] This legal reasoning is considered the major contribution of the Hanafi legal thought to this debate. Evidently, the dichotomy of *dar al-Islam* and *dar al-harb* does not refer to the state of peace or war of *dar al-Islam* with other jurisdictions. Fundamentally, it refers to the perception of the international relations of the various jurisdictions around *dar al-Islam*.[22]

In brief, the majority of jurists define *dar al-Islam* as the territory or entity in which the laws of Islam are dominant (*ahkam al-Islam zahira*), even if the majority of its residents are *kuffar* (non-Muslims).[23] However, for the Hanafis, the essential feature of *dar al-Islam* is the security (*aman*) for its residents.[24] It appears that there are two trajectories regarding the defining factors for *dar*. The first being that Malikis, Shafi'is, and Hanbalis argue that *dar* is mainly characterized by the legal dominance over this jurisdiction.[25] The second that Hanafis stress that security (*aman*) is the major deciding factor in this situation.[26]

Ikhtilaf al-darayan

The concept of *ikhtilaf al-darayn* is a unique Hanafi legal concept. The theoretical foundation of this concept is based on the absence of the protection (*'isma*), which is intertwined with legal and political jurisdiction. Recognizing the geo-political realities, Hanafis perceive Muslims and non-Muslim as two independent legal characters, each having his/her own legal status. Hanafis differentiate between the legal status of a *dhimmi* and a *musta'man*[27] residing in *dar al-Islam*. Despite both of these individuals adopting the same religion; they belong to two different legal jurisdictional categories in terms of their relation to *dar al-Islam*.

At the core of the concept of *ikhtilaf al-dar*, there are three main factors: (1) residency, where the individuals reside (i.e. in *dar al-Islam* or *dar al-harb*); (2) legal status of the individuals (*musta'man, harbi,*[28] *dhimmi*[29] *or Muslim*); (3) the existence of *al-man'a* (secured jurisdiction). Hanafis refer to two situations in which the concept of *ikhitilaf al-dar* and its legal consequences are applicable: (1) the disparity of the legal and physical proximity of two jurisdictions (*tabayn al-dar*); (2) the absence of inviolability, or protection for people's life or property (*inqita' al-'isma*). The most interesting point in this legal framework is the Hanafi introduction of two sub-categories of *ikhtilaf al-darayn*, namely: *al-ikhtilaf al-hukmi*[30] *and al-al-ikhtilaf haqiqi.* [31]

The legal structure of *ikhtilaf al-darayn* is not influenced by the religious affiliation of the individuals. Thus, the concept of security or protection (*'isma*) is not violated by adopting a certain religion.[32] The explicit evidence that *'isma* does not emanate from a certain religious affiliation is al-Shaybani's discussion of the case of a *harbi* in *dar al-harb* who converted to Islam within this jurisdiction. Thereafter, he was killed by mistake by another Muslim. According to Muhammad and Abu Yusuf, the killer would have had to expiate for this act of killing but would not have to pay any blood money (*diya*).[33] For Abu Hanifa, he should not even expiate for this act of manslaughter. He

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[21] Al-Kasani, 'Ala' al-Din. *Bada'i' al-Sana'i'*, vol. 7. 130.

[22] Qasim, Muhammad Muhy al-Din, *al-Taqsim al-Islami li al-ma'murah*, 22-30.

[23] Ibid., 81.

[24] Al-Kasani, 'Ala' al-Din. *Bada'i' al-Sana'i'*, vol. 7. 130-32.

[25] Ibn 'Abidin, *Radd al-Muhtar*, vol. 4.175. al-Shaybani, *al-Siyar al-Kabir*, vol. 4. 320.

[26] Al-Kasani, 'Ala' al-Din. *Bada'i' al-Sana'i'*, vol. 7. 130.

[27] A temporary resident who lives in *dar al-Islam* entering with a security contract for a fixed time. The legal literature suggests that this period of time does not normally exceed one year. After this period, the individual would be either forced to leave dar al-Islam or he/she would be liable for taxes. In this situation, he/she would be treated in all legal matters similarly to *dhimmis*.

[28] A term used to refer to a non-Muslim living permanently in a territory upon which Muslims have no control and its residents have no agreements with dar al-Islam. Importantly, it indicates that war could break out between this territory and dar al-Islam.

[29] A permanent non-Muslim resident in dar al-Islam, enjoying permanent protection (*'isma*), whilst usually paying taxes and being subject to most of the Muslim laws, especially those related to transactions.

[30] This term deals with the legal status of the individuals within different political jurisdictions.

[31] It refers to the permanent residency of individuals.

[32] Al-Shaybani, Muhammad b. al-Hasan. al-Siyar al-Kabir. vol. 1 (Cairo: Matabi' Sharikat al-'Ilanat al-Sharqiyya, 1971), 126.

[33] Ibid.

justified his position by arguing that expiation is obligatory for two main factors: inviolability of life (*taqawwum al-damm*) and the divine prohibition of the act of killing (*hurmat al-qatl*). In this case, he stressed that *taqawwum al-damm* can only be achieved by living within the political jurisdiction of *dar al-Islam*. The companions of Abu Hanifa disagreed with him and argued that the verse (4:92) in the *Qur'an* does not specify these two factors.[34]

REPUDIATION OF MARRIAGE BY *IKHTILAF AL-DARAYN*

Hanafis persistently maintain that *ikhtilaf al-darayn* is a reason for the invalidation of a marriage contract.[35] They argue that this concept goes against the core meaning of marriage. In this context, *ikhtilaf al-darayn* means that the husband and wife permanently reside in different jurisdictions, and hence they belong to different legal and political realms. For instance, if a husband/wife permanently reside in *dar al-harb* and either one of them converts to Islam and decides to migrate to *dar al-Islam*, this situation will constitute *ikhtilaf al-darayn* and therefore result in the marriage being nullified. By the same token, if a permanent resident in *dar al-Islam*, a Muslim or *dhimmi*, decides to enter *dar al-harb* to reside there permanently either due to forsaking his religion or breaching his *dhimmi* contract, this situation represents *ikhtilaf al-darayn* and therefore in this instance, a marriage contract would also be invalidated.[36]

In this context, Hanafis developed unique sub-categories of the concept of *ikhtilaf al-darayn*, namely *al-ikhtilaf al-haqiqi wa al-ikhtilaf al-hukmi*. In effect, the legal concept of *ikhtilaf al-darayn* is operative when *al-ikhtilaf al-haqiqi* and *al-ikhtilaf al-hukmi* are both sustained.[37] In modern legal terms, *al-ikhtilaf hukmi* refers to the legal status of individuals within *dar al-Islam* or *dar al-harb*. As for *al-ikhtilaf al-haqiqi*, it points to the permanent residence of individuals either in *dar al-Islam* or *dar al-harb*. As a result, *al-ikhtilaf al-hukmi* and *al-ikhtilaf al-haqiqi*, as separate legal concepts, do not have any legal imperative.[38]

Furthermore, the Hanafi jurist al-Sarakhsi discussed many cases through which we can monitor the dynamics of the Hanafi position concerning the legal consequences of *ikhtilaf al-darayn*. In his chapter on marriage of the people of war (*zawaj ahl al-harb*), al-Sarakhsi declared that a Muslim can marry a non-Muslim *kitabiyya*[39] in *dar al-harb*. However, he maintained that this marriage is reprehensible (*makruh*). He listed three reasons for this verdict. If the Muslim husband married this *kitabiyya*, he might choose to live in *dar al-harb*, which according to a *hadith* quoted by al-Sarakhsi suggests that the Prophet disavows any Muslim that dwells among *mushrikun* (non-Muslims).[40] Al-Sarakhsi explained that this situation puts the off-spring at risk of slavery and may also lead to acculturation of the values and morals of the *kuffar*, which entails *fitna*.[41] Moreover, it was asserted that if the husband decided to permanently leave *dar al-harb* without accompanying his wife, the marriage would be legally repudiated *haqiqatan wa hukman*.[42] For al-Sarakhsi, the wife is considered from *ahl al-harb* and yet her husband belongs to *dar al-Islam*. As a result, he argued that the difference of *dar*s in this situation leads to the repudiation of marriage. It appears that this position is uniquely held by the Hanafis.[43]

On the contrary, al-Shafi'i (Muhammad b. Idris, d. 820) does not consider *ikhtilaf al-dar* as a cause of invalidating marriage. Al-Sarakhsi details how al-Shafi'i substantiates his views on this issue in the following fashion. First, al-Shafi'i supports his opinion with many narrations (*athar*) in which we learn that Abu Sufyan converted to Islam in Marr al-Zahran near the Prophet's camp outside of Makkah.[44] But his wife Hind bint 'Utba was in Makkah which was then considered *dar al-harb*. Then, when the Prophet entered Makkah, there is no account of the marriage between Abu Sufyan and his wife Hind

[34] Ibid.

[35] Al-Sarakhsi, al-Mabsut, vol. 5. 51. Al-Kasani, *Bada'i' al-Sana'i'*, vol. 2. 338. Al-Nasafi, *al-Bahr al-Ra'iq*, vol. 3. 229. Ibn al-Humam al-Hanafi, *Fath al-Qadir*, vol. 3.291., al-Tahawi, *Sharh Ma'ani al-'Athar*, vol. 3. 256. Al-Jasas, *Ahkam al-Qur'an*, vol. 3.439.

[36] Al-Shaybani, *al-Siyar al-Kabir*. vol. 5. 1823-24.

[37] Al-Sarakhsi, al-Mabsut. vol. 5. 50.

[38] Al-Sarakhsi, al-Mabsut, vol. 10. 60-61.

[39] Who believes in a revealed book (Torah or Gospel)

[40] Al-Sarakhsi, *al-Mabsut*, vol. 10. 131.

[41] Ibid.

[42] Ibid.

[43] Ibid., 50.

[44] Ibid., 51.

being renewed. Another *athar* which al-Shafi'i quotes describes that when the Prophet entered Makkah, 'Ikrima b. Abi Jahl and Hakim b. Hazam fled to Yemen.[45] Later, their wives converted to Islam and they asked the Prophet for *aman* for the return of their husbands. Eventually, they were able to bring their husbands back to Makkah and the Prophet did not renew the marriage contract between them.[46] In brief, *ikhtilaf darayn* is, at its core, a difference of political boundaries and legal mandate over certain jurisdictions (*ikhtilaf wilayat*). The corollary of *ikhtilaf al-darayn*, according to al-Shafi'i, does not negate the essence or the validity of the marriage contract. For instance, if a *harbi* (a non-Muslim who belongs to a jurisdiction the Muslim jurisdiction does not have a treaty with) were to move from *dar al-harb* to *dar al-Islam* with the *aman* contract, his marriage would not be repudiated. By the same token, if a Muslim entered *dar al-harb* with the *aman* contract, his marriage should not be rescinded. A situation where marriage would be annulled, for al-Shafi'i, is when a woman decides to migrate (*muraghama*) to another *dar* (jurisdiction).[47] The reason for annulment of the marriage contract, according to al-Shafi'i, would be the wife's clear intention of *muraghama* and the usurpation of the husband's right.[48] Hanafis agree with al-Shafi'i in this case that a marriage contract would be nullified but for a different reason, namely the *tabayun al-dar*.[49]

The dynamics of the dichotomy of *dar al-harb* and *dar al-Islam* can be observed through the Hanafi lengthy legal refutation of al-Shafi'i's previous opinion. The rebuttal is structured in four stages. First, the following *Qur'anic* verse is quoted stating that God ordered the Prophet not to return the women who migrated from Makkah to Madina back to their husbands:

Oh you who believed! When believing women come to you as emigrants, examine them. God is most knowing as to their faith. And if you know them to be believers, then do not return them to the disbelievers they are lawful (wives) for them, nor are they lawful (husbands) to them. But give the disbelievers what they spent. And there is no blame upon you if you marry them when you have given them their due compensation. And hold not to marriage bonds with disbelieving women, but ask for what you have spent and let them ask for what they spent. That's the judgment of God. He judges between you. And God is Knowing and Wise. (60:10)

Hanafis maintained that this verse does not specify the intent of migration (*muraghama*), which al-Shafi'i utilized in his legal reasoning to repudiate marriage. Therefore, to maintain this concept as the sole reason for the annulment of marriage is an embellishment (*ziyada*) to the text. Additionally, Hanafis asserted that the second half of this verse (hold not to marriage bonds with disbelieving women) indicates that a Muslim husband's marriage contract is rescinded once he migrated from *dar al-harb* and entered *dar al-Islam*. In effect, this verse is addressing the marriage contract with a *kafira*,[50] not the *dhimmiyya* or the *kitabiyya*. Second, Hanafis quoted a report from 'Umar b. al-Khattab that he announced in Makkah: "Whoever wanted his wife to be divorced or his marriage to be rescinded, then, he should follow me in the *hijra*".[51] Al-Sarakhsi used 'Umar's statement to draw an analogy between those who resided in *dar al-harb* and the legal ruling (*ahkam*) related to the dead person in relation to their relatives or husbands in *dar al-Islam*. Legally speaking, since the marriage contract is annulled by death the same ruling applies to the territorial difference of legal and political jurisdictions (*ikhtilaf al-dar haqiqatan wa hukman*). Third, Hanafis refuted the examples provided by al-Shafi'i by stressing that a Muslim who resides permanently in *dar al-Islam* yet enters *dar al-harb* temporarily with an *aman* contract, still belongs to the territorial jurisdiction of *dar al-Islam* (*hukman*).[52]

Ikhtilaf al-dar v. ikhtilaf al-din

In his chapter on "marriage of people who reside in *dar al-harb*", al-Sarakhsi discusses the problem of a married couple, one of whom converts to Islam in *dar al-harb*.[53] For Hanafis, if the husband was the one who converted to Islam and his wife was a *kitabiyya*, their marriage would be valid. They

[45] Ibid.
[46] Ibid.
[47] Ibid., 52.
[48] Ibid., 51.
[49] Ibid.
[50] In this specific context, it refers to female Meccan polytheist.
[51] Al-Sarakhsi, *al-Mabsut*, vol. 10. 52.
[52] Ibid., 54.
[53] Ibid., 56., Al-Shaybani, *al-Siyar al-Kabir*, vol. 5. 1823-4.

justified this situation by stressing that initiating a marriage contract in these previous terms is valid; hence it continues as if the marriage is already established.[54] However, if the wife converted to Islam and her husband did not, this would lead to the annulment of the marriage. This repudiation of marriage, however, would be contingent upon the completion of three menstrual cycles, and whether the marriage was consummated or not.[55] Hanafis based their opinion on two main elements: the wife's permanent residency and her legal status. In other words, since she permanently resides in *dar al-harb*, the Muslim ruler has no legal powers over this jurisdiction. More importantly, according to Hanafis, her conversion to Islam does not annul her marriage contract per se. Hanafis emphasized that neither conversion to Islam nor the adherence to a different religion necessitates the repudiation of marriage.[56] Thus, if the wife converted to Islam while residing in *dar al-Islam*, the annulment of marriage would be determined by offering Islam to her non-Muslim husband. In the event of her husband's rejection of Islam, he would be considered in violation of the right to hold his wife with fairness/custom (*ma'ruf*).[57] Nonetheless, in *dar al-harb*, Hanafis asserted that this process is not possible because the legal domain of *dar al-Islam* does not apply to them. The Muslim ruler has no legal or political influence over this jurisdiction. Therefore, the repudiation of marriage will be determined by three menstrual cycles, which will be considered as replacement for offering Islam three times to the husband.[58]

Yet, al-Shafi'i argued, if the wife converted to Islam before the consummation of marriage, the marriage contract would be rescinded by conversion. But if conversion occurred after the consummation of marriage, the annulment of the marriage contract would be dependent upon the completion of her waiting period (*'idda*). For al-Shafi'i, this legal ruling is not influenced by the dichotomy of *dar al-harb* or *dar al-Islam*. According to al-Shafi'i, the major factors to investigate are the consummation of marriage and conversion. The Andalusian Maliki scholar Ibn 'Abd al-Barr (Abu 'Umar Yusuf b. 'Abd Allah b. Muhammad, d. 1070) stressed that the concept of *ikhtilaf al-daryn* is not in the *Qur'an*, *sunnah*, or *qiyas*. Thus, he adopted the concept of *ikhtilaf al-din* (the difference of religion). He confirmed that the locus of the legal ruling of repudiating marriage is *ikhtilaf al-din*. If *ikhtilaf al-din* existed, a couple belonging to different religious affiliations one of which that is not recognized by Islamic law, the marriage contract would be rescinded.[59] The same position has been conveyed by Ibn Qudama al-Hanbali (Abu Muhammad 'Abd Allah b. Ahmad b. Muhammad b. Qudama, d. 1223). In his book on "the marriage of the people of disbelief (*shirk*)", he stressed that Islamic law (*ahkam al-Islam*) is operative regardless the nature of the jurisdiction (*dar*). Ibn Qudama included another interesting point concerning the legal influence of *ikhtilaf al-dar* upon the marriage contract. He argued that marriage is a mutual compensatory contract, so it cannot be repudiated because of *ikhtilaf al-dar*.[60] In other words, territorial proximity and the lack of Muslim political jurisdiction are not essential factors to decide the validity of a marriage contract.

Ikhtilaf al-dar & executing *hudud*

As discussed previously, the legal concept of *ikhtilaf al-dar* is influenced by different factors such as residency and legal status of individuals. The dynamics of the Hanafi legal theory can be analyzed through the problem of enforcing criminal codes (*hudud*) upon a Muslim in *dar al-harb* or enforcing them upon a *musta'man* in *dar al-Islam*. This leads us to ask whether the *hadd* would apply to the Muslim in *dar al-harb?* Or is the *hadd* inapplicable outside the political and legal jurisdiction of *dar al-Islam*? And whether the *musta'man*, like the *dhimmi*, is subject to *hadd* in *dar al-Islam*?

In fact, the majority of jurists argue that Muslims are subject to Islamic law if they commit a crime outside the political and legal jurisdiction of *dar al-Islam*.[61] In other words, they maintain a universal application of the law regardless of the political and legal context. Noticeably, the religious affiliation of the individual is at the core of this legal viewpoint. However, it is clear that this opinion overlooks

[54] Al-Shaybani, *al-Siyar al-Kabir*, vol. 5. 1823-4.
[55] Ibid.
[56] Ibid.
[57] Al-Sarakhsi, *al-Mabsut*, vol. 5. 56.
[58] Ibid.
[59] Ibn 'Abd al-Barr, *al-Istidhkar*, vol. 16. 323.
[60] Ibn Qudama, *al-Mughni*, vol. 10. 5-8.
[61] Al-Shaybani, al-Siyar al-Kabir. vol. 1. 306. Al-Kasani, 'Ala' al-Din. *Bada'i' al-Sana'i'*. vol. 7. 237., Ibn Qudama, al-Mughni, vol. 7. 657. Al-Sarakhsi, al-Mabsut, vol. 26. 123.

the limited political and legal power of *dar-Islam* outside its jurisdiction. By contrast, Hanafis maintain that if a Muslim or a *dhimmi* commit a crime in *dar al-harb*, such as theft or murder, they would not be punished in *dar al-Islam*. This argument is supported by three points. First, they stressed that the legal responsibility for these crimes is exclusively imperative within the jurisdiction of *dar al-Islam*. Second, the Muslim ruler (*Imam*) in *dar al-Islam* has no power, political or legal, over other regional entities. Third, the applicability of any punishment is contingent upon the ability to execute it. In this case, it is evident that the execution of these punishments is out of the ruler's capacity; therefore these punishments should not apply.[62]

Executing *hudud* in *dar al-Islam*

Hanafis make a distinction between the legal responsibility of the individual and his legal status within *dar al-Islam*. In other words, if a *harbi* entered *dar al-Islam* with an *aman* contract, then killed a permanent resident of *dar al-Islam*, Muslim or a *dhimmi*, by mistake or even on purpose, or committed adultery with a Muslim woman or a *dhimmiyya*, or engaged in any criminal acts such as theft or highway robbery, he would not be revoking his inviolability.[63] However, the perpetrator would be subject to punishments related to rights of the community as explained earlier (*huquq al-'ibad*) such as false accusation of adultery (*qadhf*)[64] or retaliation (*qisas*) if a Muslim was intentionally killed.[65]

In the realm of this paper, I argue that Hanafis situated the discussion on *hudud* in relation to *haquq Allah* and *huquq al-'ibad* within the framework of the Muslim political jurisdiction. Hanafis perceive *huquq Allah* as more of a generic concept that is related to those rules and duties that God prescribed on his servants (*'ibad*). Importantly, these rules are not necessarily legally enforceable and the *Imam* has the room not to execute these *hudud* in the event of reasonable doubt or simply by denial on the part of the defendant in a *hudud* crime.

Anver Emon accurately explained that to translate *huquq Allah* as "rights of God" seems inappropriate. Theologically, God does not litigate and is free from any need.[66] He stressed that Muslim jurists used *huquq Allah* to refer to the well being of society that the *Imam* or ruler must uphold in the light of his power over society. In light of this juristic usage the phrase "rights of God" is used as a term of art to represent the social good that must be effectuated by the *Imam*.[67] Emon argued that the rights of God capture those interests that secure the public well-being (e.g. order, security). Furthermore, Emon appeared to be supporting the idea that the rules that benefit individuals only are private rights or the *huquq al-'ibad*.

Additionally, Baber Johansen[68] stated that *huquq al-'ibad* is supposed to be the property of private legal persons who dispose of their claims at their own free will and who decide of their own accord whether they want the authorities to interfere with their conflicts or not. In other words it can be said that *huquq al-'ibad* are private matters that allow individuals to order their affairs without state interference.[69]

Johansen added that the political authority or the *Imam* should oversee and uphold the claims of God. In cases involving the claims of God, the ruling authority and the individual are not considered equal players.[70] The ruler upholds the public interest; the individual serves it. Johansen refers to the punishment for theft, the amputation of the thief's right arm, which is considered to be a claim of God. But the crime of theft may also involve an individual, private claim for compensation.[71] For Johansen, the owner of the stolen property can bring the case before the *qadi (judge)* and request punishment of the thief. But if he does so, he forsakes his claim to financial compensation for this

[62] Al-Shaybani, *al-Siyar al-Kabir*, vol. 1. 307.

[63] Al-Shaybani, al-Siyar al-Kabir, vol. 5. 1853. Al-Kasani, *Bada'i' al-Sana'i'*, vol. 7. 237. Al-Sarakhsi, al-Mabsut, vol. 26. 123.

[64] Al-Shaybani, al-Siyar al-Kabir, vol. 1. 305.

[65] Ibid., 305.

[66] Emon, Anver. "Huquq Allah And Huquq Al-'Ibad: A Legal Heuristic for a Natural Rights Regime", *Islamic Law and Society*, 13:3 (2006): 329.

[67] Ibid., p. 329.

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[69] Emon, Anver. "Huquq Allah And Huquq Al-'Ibad: A Legal Heuristic for a Natural Rights Regime", Islamic Law and Society, 13:3 (2006): 331.

[70] Emon, 332.

[71] Ibid., 332.

property. Private claims and liabilities cannot be regulated by means of public punishment. If the government makes use of its absolute prerogatives, it does not do so in order to secure private advantages as this is not interchangeable.[72] He argues that God does not tolerate any sharing of his claims with individual legal persons.[73] He proceeds to contend that this rule is clearly meant as an incentive for private legal persons to settle their claims privately rather than requesting justice according to the public law.[74] For Johansen, under Hanafi law, the ruler upholds the public interest (amputation of the thief) to the exclusion of private interest (e.g. compensation). He suggested that a victim of theft under Hanafi law can either privately negotiate with an alleged thief to obtain compensation or petition a *qadi* to enforce the corporal sanction. But the *qadi* cannot do both, as the state is permitted to enforce only the rights of God.[75]

This paper contends that *huquqAllah* is not merely related to the concept of 'public law' as suggested by Bernard Weiss. Otherwise, it would be unattainable to legally qualify the expiatory punishments (*kaffarat*) or alms-giving (*zakah*) as *huquq Allah* despite the fact that they mainly relate to the private sphere of the individuals (*al-'ibad*). Moreover, the Lawgiver's claims are always intertwined with his servants' interests. For example, *zakah* is considered both *haqqAllah* (the religious obligation to give out charity) and *haqq al-'ibad* (those who deserve this charity). For this reason, there are different legal viewpoints whether a political leader should interfere to legally abide people to give out their *zakah* because it is related to *huquq al-'ibad* or should not enforce this as it is a religious duty that addresses the conscience of the believer, of which the state has no role in managing.

Hanafis use the term *huquq al-'ibad* in their legal literature, which has been translated throughout as 'rights of the community', to refer to securing the social good of the community and individuals; therefore enforcing these rights are imperative and cannot be eschewed.[76] In this context, I argue that *huquq al-'ibad* could refer to both the communal and individual rights, which follows the justifications in the Hanafi legal literature for most of the corporal punishments (*hudud*) relating to preserving and securing the social order within the community.

Obviously, to argue that the state is exclusively required to enforce the right of God does not capture the spirit of the Hanafi legal reasoning on this issue. In fact, the state is expected to guard *huquq Allah* and enforce *huquq al-'ibad*. Hanafis have stressed that the judge (*qadi*) is expected to enforce and protect the rights of *'ibad* and give it precedence over *huquq Allah*, in the event of apparent conflict. Absolutely, in the case of *hudud* punishments, it is believed by the Hanafi school that God does tolerate His claims to be waived in the case of reasonable doubt. Throughout my argument, I claim that Hanafis contextualized these concepts within the framework of the litigation process not just merely personal negotiation. In other words, the Hanafi ruling has given the judge the authority to waive the claims of God in case the claims of the *'ibad* are met. Hanafis developed the norm that *huquq al-'ibad* takes precedence (*muqadama 'ala*) over *huquq Allah*. So, both of these claims are managed by the state. There is an aspect which is absent from the previous discussions on the Hanafi position in that *huquqAllah* and *huquq al-'ibad* have been framed within the political jurisdiction of *dar al-Islam*. In addition, the applicability and enforcement of these rights is not absolute in itself. Hanafis consistently hold that *hadd* (a prescribed punishment) should not be applied if the thief has returned the money to the original owner even if the matter has reached the *Imam*.[77]

In short, *haqq Allah* and *haqq al-'ibad* are not absolute legal categories. In fact, it is difficult to separate these two concepts because they are deeply interwoven. A discrepancy has been identified in the Hanafi legal literature in applying these two concepts. Hanafi jurists do not hold, in their legal determinations, a unified legal framework of what constitutes *haqq Allah* and *haqq al-'ibad*. This tendency fluctuates significantly from the criminal punishments to business transactions (*mu'amalat*), or rituals (*'ibadat*) such as *zakah* (alms). To put it differently, these claims (*huquq*) show different dynamics in different legal themes. Most importantly, when these two types of *huquq* are in conflict, the overriding view of the Hanafi position is that *haqq al-'abd* takes precedence over *haqq*

[72] Ibid., 333.
[73] Ibid.
[74] Ibid.
[75] Ibid.
[76] Ibid., 333.
[77] Al-zala'i, *Tibyan al-Haqa'iq*, vol. 3. 229.

Allah. For instance, Hanafi jurists clearly stated that if a person owes a certain amount of money to anther individual and the borrower wants to use this money to perform pilgrimage (*hajj*), the obligation is to give the money back to the creditor and *hajj* should be delayed.

Moreover, Hanafis hold different opinions regarding applying *hudud* to a *musta'man*, especially the punishments related to adultery and theft. Unlike Abu Yusuf, Abu Hanifa and Muhammad consider these *hudud* to be a claim (*haqq*) for God and since a *harbi* does not share the same belief as a Muslim, he is therefore not addressed to fulfill this *haqq*.[78] However, Hanafis never applied this previous reasoning to the *dhimmi*s, who obviously held different beliefs from Muslims in *dar al-Islam*. Hanafis agreed that a *musta'man* will be punished for falsely accusing a Muslim of adultery (*hadd al-qadhf*) because this punishment partly entails rights of the individual/community (*haqq al-'ibad*).[79] Noticeably, Hanafi jurists suppose a direct relationship between qualifying a certain action as *haqq Allah* or *haqq al-'ibad* and legal enforceability of *hudud* punishments.

Hanafis appear to be lacking a unified view of the concept of *haqq Allah* and *haqq al-'ibad*, especially when they apply it to *hudud* crimes. For instance, they argue that there is no retaliation (*qisas*) upon a *dhimmi* or a Muslim for deliberately killing a *musta'man* in *dar al-Islam*. They contradicted their previous justification (i.e. *qisas* is *haqq al-'ibad*) claiming that *qisas* is *haqq Allah*.[80] Noticeably, this specific justification seems to hold only in the early Hanafi legal works. There is no such reasoning within the *madhhab* in the later legal works. For example, al-Sarakhsi argued that unlike the *musta'man*, a *dhimmi* is a permanent resident in *dar al-Islam* and he enjoys a permanent protection.[81] Al-Sarakhsi appears to be justifying the ruling due to the different legal status of each of these categories of individuals. Similarly, al-Kasani provided nearly the same justification. He added a clever riposte that a *musta'man* only temporarily resides in *dar al-Islam* and therefore, the legal status of this individual might represent an area of doubt (*shubha*) which would prevent the *hadd* upon the Muslim or the *dhimmi*.

In the case of the theft of money from a *musta'man* by a Muslim or *dhimmi* in *dar al-Islam*, Hanafis stated that there would be no amputation of the hand (*hadd*) by applying juristic preference (*istihsanan*); however, on the basis of legal analogy (*qiyas*), the *hadd* penalty should be executed.[82] The justification of *qiyas* is that money belonging to a *harbi* entering *dar al-Islam* with an *aman* contract is protected, as the individual would have acquired the same legal status as a *dhimmi*.[83] The justification of the *istihsan* however is that the stolen money suffers a *shubha* of violability (*al-ibaha*) because the *harbi* is temporarily residing in *dar al-Islam*.[84] This in itself qualifies the stolen money for a *shubha*. This same argument has been used to justify waiving *qisas* in the case of a *musta'man* being killed by a Muslim on purpose within the jurisdiction of *dar al-Islam*.[85] Despite the *hadd* punishment being waived for the Muslim, the perpetrator would still be liable for the stolen money as it is a human claim (*haqqal-'ibad*) and these types of rights (*huquq*) do not dissipate because of a perceived *shubha*.[86] Interestingly, Hanafis have argued that as part of ikhtilaf *al-daryn* the *hadd* punishment is waived if a Muslim commits any *hadd* crime in *dar al-harb*; however, it has been seen that even if the *hadd* was applicable upon a Muslim within the jurisdiction of *dar al-Islamistihsan* has been used to waive the *hadd*.[87]

Al-Shaybani mentioned that jurists differed whether *ahl al-dhimma* are subject to *hudud* or not. He explained that *ahl al-Madina* (Malikis) argued that *hudud* do not apply to *ahl al-dhimma*.[88] On the contrary, Hanafis viewed *dhimmi*s as permanent residents in *dar al-Islam*; therefore, they considered them to be subject to all the *hudud*, in the event of them committing any *hadd*.[89] Those jurists who contended that *dhimmi*s are subject to *hudud* in *dar al-Islam* support their argument with a narration (*khabar*) that the Prophet ordered that *hadd* should be applied to a Jew who committed *zina*

[78] Ibid., 306
[79] Ibid.
[80] Ibid., 307.
[81] Al-Sarakhsi, vol. 26. 134. Abdullah b. Mawdud, *al-Ikhtiyar*, vol. 5. 27.
[82] Al-Sarakhsi, vol. 26. 134
[83] Ibid.
[84] Ibid.
[85] Ibid.
[86] Al-Kasani, *Bada'i' al-Sana'i*, vol. 7. 56-7.
[87] Ibid., 56-7.
[88] Al-Shaybani, al-Siyar al-Kabir, vol. 1. 306.
[89] Al-Shaybani, al-Siyar al-Kabir, vol. 1. 306. Al-Kasani, *Bada'i' al-Sana'i*, vol. 7. 34-5.

(adultery) and following this was stoned.[90] This excludes the punishment for drinking alcohol (*hadd al-khamr*) as *dhimmi*s do not believe that alcohol is prohibited in their belief system. Thus, there is no valid cause for the punishment without the belief in alcohol prohibition. In other words, *dhimmi*s are obliged to follow the Islamic law only in matters pertaining to commercial transactions (*mu'amalat*).[91]

Executing *hudud* in *dar al-harb*

Consistently, Hanafis have maintained that the Muslim ruler has no powers outside the boundaries of *dar al-Islam*. Hanafis place a significant weight for the role of the Muslim ruler in executing the law.[92] Al-Kasani provided a clear-cut statement that the authority of applying *hudud* is exclusively the right of the political leader (*Imam*).[93] Therefore, Hanafis acknowledge the constraints of the legal and political powers of the Muslim ruler outside the Muslim jurisdiction. This theory is explicit in their discussions on applying *hudud* in *dar al-harb*. For instance, Hanafis maintained that if a Muslim committs adultery (*zina*), theft, false accusation of adultery (*qadhf*), or is involved in drinking alcohol in *dar al-harb*, the individual would not be liable for any of these crimes. The standard justification for this situation is that the Muslim ruler (*Imam*) is not capable of executing *hudud* in *dar al-harb* because of the absence of legal and political jurisdiction (*'adam al-wilaya*). Furthermore, the individual would not be not liable for any punishment upon their return to *dar al-Islam* as these crimes would have occurred within the context of *dar al-harb* which does not constitute a valid reason for applying the *hadd*.[94]

Similarly, there is no retaliation (*qisas*) if a Muslim intentionally kills another Muslim or *harbi* in *dar al-harb*. The Muslim ruler cannot execute the *hadd* without a secured political jurisdiction (*man'ah*).[95] Also, given that when a crime happens in *dar al-harb* this context introduces an element of doubt (*shubha*). In this process, *shubha* prevents applying the retaliation (*qisas*).[96] As a result, a murderer would be only liable for blood money (*diya*) whether the act of killing was by mistake or not. This is a clear example that security for life and property (*al-taqawwum*) is only achieved within the jurisdiction of *dar al-Islam*, not by adopting any religious affiliation.[97]

CONCLUSION

In this paper I have argued that the Hanafi school is consistent in their adoption and application of the theory of *ikhtilaf al-darayn* in the early and late primary Hanafi legal literature. I have demonstrated that Hanafis place a significant weight on the role of the Muslim ruler in executing the law. Therefore, they acknowledge the constraints of the legal and political powers of the Muslim ruler outside the Muslim jurisdiction. Consequently, the legal imperative of these legal concepts have been exclusively framed within the political jurisdiction of *dar al-Islam*.

Hanafi Jurists have used the concepts of *dar al-harb*, *dar al-kufr*, and sometimes *dar al-shirk* interchangeably. This raises questions whether jurists perceived any *dar* other than *dar al-Islam* as being *dar al-harb*. For Hanafis, religious affiliation has no effect in legally qualifying any political jurisdiction. The majority of legal schools, however, have perceived religion as a main component in this structure. This has been manifested in the case of invalidation of marriage by *ikhtilaf al-dar* for the Hanafis and by *ikhtilaf al-din* for most other legal schools. Clearly, the concept of *ikhtilaf al-dar* developed by the Hanafis is a multilayered legal framework. This legal concept is structured around residents in *dar al-Islam* and *dar al-harb* as being two independent legal characters, each having their own legal statuses dependent upon their residency. Essentially, among the legal consequences of *ikhtilaf al-dar* is the repudiation of marriage contracts and the waiving of *hudud* penalties and retaliation (*qisas*). Nonetheless, *ikhtilaf al-darayn* is legally operative only when the conditions of *al-ihktilaf al-haqiqi wa al-hukmi* are met.

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[90] Ibid., p. 307.
[91] Al-Shaybani, al-Siyar al-Kabir, vol. 1. 306
[92] Al-Kasani. *Bada'i' al-Sana'i*, vol. 7. 45-46.
[93] Ibid., 56-7,
[94] Ibid., 34-35.
[95] Ibid.
[96] Ibid.
[97] Ibid., 131.

Strictly speaking, the *Qur'an* is almost absent in the debates and discussions on this topic. Unlike the *Qur'an*, the *sunnah* has played an essential role in developing certain aspects of this theory. In their efforts to synthesize this theory, most jurists projected their legal reasoning upon two major events in Muslim history. First, they relied upon the event of the migration (*hijra*) from Makkah to Madina in 622 CE (Common era). Second, many of their legal determinations were inspired by the conquest of Makkah in 630 CE. These two incidents had inspired most of the legal reasoning and debates on this topic in the legal literature.

The concept of *dar* is deeply interrelated with the political and legal dominance of the political leader over the jurisdiction of *dar al-Islam*. Many jurists conditioned the transformation of any territory into *dar Islam/dar kufr* upon the ability of the political ruler to enforce the law. In this regard, Hanafis relegate the authority to apply the law exclusively to the ruler. The legal literature proves that Hanafis adopt a unique perception of the intrinsic political nature of *dar al-Islam*. They base their legal rulings on the elements of security and fear and not upon certain religious affiliations.

We observed that Hanafis developed the theory of *haqq Allah* (claims of God) and *haqq al-'ibad* (claims of the community) to point to the obligatory and supererogatory aspects of the law. In this context, this theory mainly addresses the issue of applying *hudud* to *harbi's* within the jurisdiction of *dar al-Islam*. Theoretically, for any type of crime that is related to *haqq al-'ibad*, such as *qadhf* , Hanafis argued that a punishment should be carried out. But if a crime is related to *haqq Allah* such as theft, the punishment may be waived because the *hadd* in this case is God's claim; however, the stolen money must be returned. Similarly, if a *musta'man* commits *zina*, they would not be subject to the *hadd*, but would be liable to pay a dowry (*mahr*) to the woman. Hanafis stressed that having sexual intercourse out of the wedlock necessitates either *mahr* or *hadd*. In this case the *hadd* would be waived for the payment of the *mahr*.[98] An inconsistency of this theory appears when Hanafis legally qualify *qisas* as *haqq al-'ibad* when they seek to retaliate from the death of a Muslim/*dhimmi* at the hands of a *harbi* in *dar al-Islam*. However, in a contradictory ruling, the *hadd* punishment is waived for a Muslim who kills a *harbi in dar al-Islam*, labeling *qisas* as *haqq Allah*.[99]

This topic shows the depth and intricacies of the classical Hanafi legal thought. The current traditionalist discourse adopts the concepts of *dar al-harb* and *dar al-Islam* as fixed legal structures. Clearly, in some traditional religious discourses these concepts are perceived as doctrinal and unchangeable legal frameworks. This paper underscores the dynamics of this topic to point to the urgency that modern Muslim jurists should revisit these historical legal determinations and their theoretical foundation. By realizing the inherent historical and ideological underpinnings of these terminologies, contemporary Muslim jurists and reformers would bring about an understanding to acknowledge the reality of contemporary international relations and the intricate nature of modern nation states. Evidently, it is counter-productive to recall pre-modern legal concepts to qualify current political structures which evolved in an entirely different set of sociopolitical circumstances. Thus, the ability to generate new legal concepts that have the ability to engage with the current intricate international relations will be contingent upon an epistemological change of the simplistic dichotomous view of the world.

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